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IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 337

PUETT ELECTRICAL STARTING GATE CORPORATION,

Petitioner,

v.

HARFORD AGRICULTURAL & BREEDERS' ASSOCIATION and UNITED STARTING GATE CORPORATION,

Respondents.

PETITIONER'S REPLY BRIEF

DANIEL L. MORRIS
New York, N. Y.
Attorney for Petitioner

EDWARD G. CURTIS
ARTHUR V. SMITH
TRUMAN S. SAFFORD
JOSEPH V. MEIGS
WILLIAM C. CONNER
ROBERT D. SPILLE
New York, N. Y.
Of Counsel

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Argument

The persistently recurring themes of respondents' brief are that the factual finding of infringement was based "solely on undisputed documentary evidence" (resp. brief pages 3, 4, 5, 7, 10, 14, 15, 18) and that the starting gates considered by the trial court were "simple" (resp. brief pages 1, 2, 7, 15, 16). *Neither of these statements is correct.* Respondents' attempt to compose a symphony of but two notes highlights the poverty of merit in their contentions. Their brief is mere argumentation by assumption and is a deliberate effort to dissuade this Court from scrutinizing the fundamental problems at bar.

I

a) The trial court's finding is not based solely on undisputed documentary evidence.

District Judge COLEMAN did not base his factual finding of infringement "solely" on documentary evidence. As pointed out in the petition (page 4) this finding was based on exhaustive oral testimony of respondents' officers and expert witness as well as upon documentary evidence. Petitioner established the fact of infringement by examining hostile witnesses (R. 31-41, 59-72, 72-78) at the trial and also by cross-examining respondents' expert witness (R. 87-123). Not only is the record replete with indications that the trier of the facts was deeply impressed by the oral testimony* on infringement but in his published opinion he states:

> "While there is considerable weight to this argument [relating to unfair competition], it is after all based upon little, if anything, more than the *cumulative* evidence that this Court has *heard* which supports Puett in its claim of *infringement* to the extent heretofore indicated. This being true, we feel that the testimony respecting unfair competition, as such, when divorced from the question of patent infringement itself, is not sufficiently strong to warrant our ruling that Puett is entitled to redress on this separate score." 88 F. Supp. 360, at 368; R. 16-17 (emphasis supplied).

This excerpt refutes respondents' repeated assertions that the District Court on the question of infringement "made no reference to any oral testimony . . . and did not refer to *any* evidence other than the models and the patent" (resp. brief pages 3, 4). Actually the District Court's analyses of the patented gate model and the infringing gate model were bottomed on the explanation of these gates given in oral testimony.

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* *e. g.* R. 118. The Court: "As I sit here and look at it from your admission, your testimony of the functioning parts of Defendant's Exhibit B, they substantially correspond to the functioning parts of Defendant's device, . . ."

b) **Respondents' crude models do not constitute undisputed physical evidence.**

The short answer to respondents' repeated statements that the crude, simplified models fabricated by them are "undisputed" physical evidence may be found in the record at page 105. There, the Court noted an important discrepancy between one of the models and a patent drawing it purportedly represented. Additionally, petitioner's counsel convincingly demonstrated to the trial court that respondents' model supposedly representing petitioner's patented starting gate was calculated to depreciate the patented structure by portraying it as of questionable reliability (R. 70, 93, 102-104).

II

The starting gates in issue are not *simple* structures.

It becomes respondents poorly to make the belated contention that the starting gates in issue are "simple". Their position and actions at the trial were obviously incompatible with their present appellate position. If the gates were so simple, why did respondents employ a highly reputed expert witness to testify to the construction and operation of the patented and infringing gates? The trial lasted almost two weeks (petitioner's brief page 12) of which four days were devoted to this expert's testimony. Compare this with the *Graver* case, which respondents single out in their brief at page 16 as a paragon of technical complexity necessitating expert evidence, wherein the trial was of similar duration to the trial of this cause.

Respondents in attempting to create and sustain the illusion of simplicity have characterized the patented structure as nothing more than "a simple gate latch". Reference to the patent, the record and the opinions of both of the courts below makes clear that the patented structure is a novel *combination* of elements forming an improved starting gate including a latch mechanism having a definite *modus operandi*. The patented structure is

not simple as a brief glance at the photograph of the accused starting gate (R. 142) will reveal.

III

Respondents rely heavily (resp. brief pages 8, 9, 11, 13, 15, 17, 18, 19) on *United States* v. *United States Gypsum Co.*, as supposedly establishing the broad, inflexible rule that an appellate court may overturn findings of fact "where the evidence is largely documentary or physical or not in dispute" (resp. brief page 10). It has already been pointed out, *supra,* that such is not the situation in this case.

Since the *Gypsum* case, this Court has enunciated the qualifying principle that, where oral testimony conflicts with documentary and physical evidence, and the trial judge chooses to weigh the oral testimony more heavily, such "a choice between two permissible views of the weight of the evidence is not 'clearly erroneous' ". *United States* v. *Yellow Cab Co.* (petitioner's brief, page 6, note 1). It is noted that in the *Gypsum* case, the trial court had dismissed the complaint at the close of plaintiff's evidence, whereas in the *Yellow Cab* case and in the case at bar both plaintiff and defendant had completed their cases.

IV

The cases cited by petitioner as incorrectly decided by the Court of Appeals have not been vindicated by respondents.

Respondents have endeavored to rationalize the erroneous decisions of the Court of Appeals which are cited in pages 7-11 of petitioner's brief. Petitioner is confident that this Court will note the obfuscatory technique of respondents in failing to meet the analyses of the decisions as stated by petitioner. The underlying note of respondents here is that patent actions are decided on the basis of "undisputed evidence" (resp. brief pages 11, 12, 13, 14, 15). This Court well knows that this is not so.

The Court's attention is called to the equivocal words used by respondents in their statements of the character of the evidence before the trial courts in the decisions cited. For example, respondents state that the evidence 'included' undisputed evidence in the *Lever Bros.* case (resp. brief page 12) and that in the *Binney & Smith* case (resp. brief page 13) it 'comprised' undisputed documentary evidence. This evasiveness is no answer to petitioner's charge that the Court of Appeals is in the habit of ignoring or riding roughshod over oral testimony which may conflict with documents.

It is difficult to understand respondents' reasoning that this Court, in the *Binney & Smith* case, bestowed an accolade upon the Court of Appeals when this Court *reversed* the Court of Appeals and thus reinstated the factual findings of the trial court, based on both documentary and oral evidence, that the patent was invalid because indefinite. Furthermore, that this Court failed to review the other decisions cited by petitioner gives small comfort to respondents' assertion of unblushing rectitude in the Court of Appeals.

V

As a matter of patent law (aside from the other errors cited), the Court of Appeals employed an erroneous test of infringement.

The error of patent law committed by the Court of Appeals was in determining non-infringement by ascribing material significance to *unclaimed* elements or limitations of the patented structure and the accused structure rather than by confining itself to the *claimed* elements or limitations. Such a test would overrule this Court's insistence that patent claims be clear and that they define the invention so that ill-defined, widespread monopolies do not terrorize industry.

This Court, speaking through Mr. Justice Stone, held that *only* the claimed elements and limitations measure the

invention covered by a patent. And a Court of Appeals errs in measuring infringement in terms of unclaimed elements or limitations. *Smith* v. *Snow et al.*, 294 U. S. 1, 55 S. Ct. 279 (1935).

The error noted will be explored more fully in discussing the merits of petitioner's case, in the event the writ issues.

VI

Respondents have avoided meeting petitioner's argument on the constitutional limitations of appellate review. They refuse to recognize the petitioner's contentions that appellate limitation is based on history as well as upon evolution of law. They stand flat-footedly on dicta in the *Gypsum* case (resp. brief p. 17).

Conclusion

Petitioner's contentions remain unanswered. For the foregoing reasons the writ should issue.

Respectfully submitted,

DANIEL L. MORRIS
Attorney for Petitioner

EDWARD G. CURTIS
ARTHUR V. SMITH
TRUMAN S. SAFFORD
JOSEPH V. MEIGS
WILLIAM C. CONNER
ROBERT D. SPILLE
New York, N. Y.
Of Counsel

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RESPONDENTS' REPLY BRIEF

W. BROWN MORTON,
New York, N. Y.,
Attorney for Respondents.

H. STANLEY MANSFIELD,
W. B. MORTON, JR.,
New York, N. Y.

J. COOKMAN BOYD,
Baltimore, Md.,
Of Counsel.